Perwira Habib Bank (M) Bhd v Megat Najmuddin bin Megat Khas & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–550 OF 1990
KAMALANATHAN RATNAM J
12 FEBRUARY 1999

Land Law *— Lien — Creation — Lien-holder's caveat — Whether right to grant lien-holder's caveat over property belongs to registered proprietor of the property only — National Land Code 1965 s 281(1) & (2)*

Legal Profession *— Duty of care — Negligence — Defendants alleged to have given incorrect advice to plaintiff — Plaintiff proved defendants' advice was not proper and it had relied on it — Whether suit for negligence can be brought against defendants — Whether standard of care was according to foresight of a reasonable man*

By way of a letter of offer dated 17 August 1984, the plaintiff granted an overdraft facility of RM700,000 to the borrower, to be secured by a registered third party first legal charge over a property whose registered owner was Loo & Sons Realty Sdn Bhd ('the owner/chargor'). In the meantime, the owner/chargor had entered into a sale and purchase agreement to sell the property to Land Holdings Sdn Bhd. The property was subject to a restriction-in-interest term which prohibits any transfer, creation of a lease or any security without the state authority's approval. One of the terms of the letter of offer was that 'utilization of the overdraft may be allowed only after the execution of all security documents and presentation of the charge for registration'. Since it would take about two months to obtain the consent from the state authority, the borrower proposed to the plaintiff the creation of a lien holder's caveat over the property. On the advice of the defendants — a legal firm — that a lien holder's caveat would be sufficient security for the disbursement of the overdraft facility, the plaintiff allowed for the drawdown of up to RM700,000. The plaintiff also contended that the defendants had advised that the security of a lien holder's caveat over the property had been duly perfected and the borrower could be allowed to utilize the facility. Since the borrower was in need of a further overdraft facility of RM500,000, the plaintiff instructed the defendants to create a fresh lien holder's caveat for the total of RM1.2m. The defendants advised that since the earlier lien holder's caveat did not stipulate a named sum, that lien holder's caveat was sufficient to secure the second overdraft facility of RM500,000. The defendants further advised the plaintiff to withdraw the lien holder's caveat lodged over the property and to relodge the same to enable the transfer of the property from the owner/chargor to Land Holdings Sdn Bhd. The plaintiff contended that the defendants had been negligent in their advice to the plaintiff and thus commenced an action against the defendants, both on breach of contract and on negligence. The plaintiff led evidence through its witness, an advocate and solicitor who had spent the last

A 18 years of her 32 years practice in banking and conveyancing, as to what a proper and competent conveyancer would have done in a similar situation.

The Court of Appeal in *Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd & Anor (No 1)* [1996] 3 MLJ 409 had held that
B there was no evidence to show that the owner/chargor had authorized Land Holdings Sdn Bhd to deposit the title deed. It was found that a valid lien holder's caveat did not exist and the court reiterated the principle that only the registered proprietor had the power or the right to deposit the title deed for the purpose of creating a lien holder's caveat.

C

Held, allowing the plaintiff's claim:

(1) The obligations that rested on the defendants were no more than as stated in the provisions of the National Land Code 1965 ('the NLC') and as found in decided cases. This case did not need an
D expert to assist the court. In a situation such as this, the true test is the foresight of a reasonable man and not the hindsight of an expert (see p 343E–F); *Midland Bank Trust Co Ltd & Anor v Hett, Stubs & Kemp (A firm)* [1979] Ch 384 followed.

(2) The defendants had advised and thus authorized the release of
E RM700,000 although they well knew that the state authority's consent had not been obtained yet. In the circumstances, on the basis of the Court of Appeal's decision and the law as laid out in s 281 of the NLC, the defendants were liable in negligence to the plaintiff for the loss suffered in respect of the overdraft facility amounting to RM700,000 (see p 344F–G).

F (3) Since the borrower was not the owner of the subject property and since the request to create the lien holder's caveat came from the borrower and not the registered owner of the property, clearly, the defendants were negligent in advising that the lien holder's caveat was sufficient security for both the first and the second overdraft
G facilities (see p 345D).

(4) The second defendant's admission that the defendants were indeed advising the plaintiff that the plaintiff was properly secured for the facility of RM1.2m to the borrower by way of a lien holder's caveat was an unequivocal admission of negligence based on the fact that the lien holder's caveat had been proven to be of
H no security at all. The plaintiff, in reliance upon the defendants' advice, suffered a further loss by giving an overdraft facility of RM500,000 without any proper security (see p 346C–E).

(5) The advice to withdraw the first lien holder's caveat was not proper. However, considering the fact that the first lien holder's
I caveat was itself invalid, this negligent advice of withdrawing it and refiling a fresh lien holder's caveat might seem of no consequence (see p 347B).

(6) The plaintiff had proved, by the two facilities provided and the drawdown made thereon, that it had relied on the advice of the defendants. The plaintiff had also shown what advice ought to have been given and that if the proper advice had been given, it would not have released the funds. Therefore, the plaintiff must succeed as against the defendants in negligence (see pp 347G–I and 348A); *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 followed.

(7) The plaintiff's loss should be based on the loss of the security. Had the defendants lodged a valid lien holder's caveat then, upon default, the plaintiff would have been able to recover upon sale of the property. Any difference after setting off the proceeds of sale and the legal costs would have been their loss. Since no challenge of any sort was taken, it was held that the defendants had conceded that the market value could be the correct value of the property (see pp 349I and 350C–D).

[Bahasa Malaysia summary

Menerusi sepucuk surat tawaran bertarikh 17 Ogos 1984, plaintif memberikan kemudahan overdraf sebanyak RM700,000 kepada peminjam, dengan keperluan cagaran dalam bentuk satu gadaian sah pertama pihak ketiga berdaftar ke atas hartanah yang mana pemilik berdaftarnya ialah Loo & Sons Realty Sdn Bhd ('pemilik/penggadai'). Sementara itu, pemilik/penggadai telah mengikat suatu perjanjian jual beli untuk menjual hartanah tersebut kepada Land Holdings Sdn Bhd. Hartanah tersebut tertakluk kepada suatu syarat sekatan-dalam-faedah yang menghalang apa-apa pindahan, pengwujudan pajakan atau apa-apa cagaran tanpa kebenaran daripada pihak berkuasa negeri. Salah satu daripada terma surat tawaran tersebut adalah bahawa 'utilization of the overdraft may be allowed only after the execution of all security documents and presentation of the charge for registration'. Oleh kerana ia akan mengambil hampir dua bulan untuk mendapatkan persetujuan daripada pihak berkuasa negeri, peminjam mencadangkan pengwujudan kaveat pemegang lien atas hartanah tersebut kepada plaintif. Atas nasihat defendan-defendan — sebuah firma guaman — bahawa kaveat pemegang lien adalah cagaran yang memadai untuk pemberian kemudahan overdraf, plaintif membenarkan penggunaan overdraf sehingga RM700,000. Plaintif juga berhujah bahawa defendan-defendan telah menasihati bahawa cagaran kaveat pemegang lien ke atas hartanah tersebut telah pun disempurnakan dan peminjam boleh dibenarkan menggunakan kemudahan tersebut. Memandangkan yang peminjam memerlukan kemudahan overdraf lanjut sebanyak RM500,000, plaintif mengarahkan defendan-defendan mewujudkan kaveat pemegang lien yang baru untuk jumlah RM1.2 juta. Defendan-defendan menasihati bahawa oleh kerana kaveat pemegang lien yang lebih awal tidak menetapkan jumlah yang dinamakan, kaveat pemegang lien itu adalah

memadai untuk membentuk cagaran bagi kemudahan overdraf kedua sebanyak RM500,000. Defendan-defendan seterusnya menasihati plaintif supaya menarik balik kaveat pemegang lien yang dimasukkan ke atas hartanah tersebut dan untuk memasukkan yang sama bagi membolehkan pindahan hartanah tersebut daripada pemilik/penggadai kepada Land Holdings Sdn Bhd. Plaintif berhujah bahawa defendan-defendan telah cuai dalam nasihat mereka kepada plaintif dan justeru itu memulakan satu tindakan terhadap defendan-defendan, kedua-dua atas kemungkiran kontrak dan atas kecuaian. Plaintif mengutarakan keterangan melalui saksinya, seorang peguambela dan peguamcara yang telah menghabiskan 18 tahun yang lepas daripada amalannya selama 32 tahun dalam perbankan dan pemindahhakan, tentang apakah yang akan dilakukan oleh seorang peguam pemindahhak yang berpengamalan dan kompeten dalam keadaan yang serupa.

Mahkamah Rayuan dalam *Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd & Anor (No 1)* [1996] 3 MLJ 409 telah memutuskan bahawa tiada keterangan bagi menunjukkan bahawa pemilik/penggadai telah membenarkan Land Holdings Sdn Bhd untuk mendepositkan suratikatan hakmilik. Ia didapati bahawa suatu kaveat pemegang lien tidak wujud dan mahkamah menegaskan prinsip bahawa hanya tuan punya berdaftar mempunyai kuasa atau hak untuk mendepositkan suratikatan hakmilik untuk tujuan mewujudkan kaveat pemegang lien.

Diputuskan, membenarkan tuntutan plaintif:

(1) Obligasi yang terletak pada defendan-defendan tidak melebihi apa yang dinyatakan dalam peruntukan-peruntukan Kanun Tanah Negara 1965 ('KTN') dan seperti yang didapati dalam kes-kes yang diputuskan. Kes ini tidak memerlukan seorang pakar untuk membantu mahkamah. Dalam keadaan seperti yang didapati di sini, ujian sebenar adalah pandangan jauh seorang yang munasabah dan bukannya pengalaman lalu seorang pakar (lihat ms 343E–F); *Midland Bank Trust Co Ltd & Anor v Hett, Stubs & Kemp (a firm)* [1979] Ch 384 diikut.

(2) Defendan-defendan telah menasihati dan justeru itu membenarkan pelepasan RM700,000 walaupun mereka memang tahu bahawa kebenaran daripada pihak berkuasa negeri belum lagi diperolehi. Dalam keadaan ini, berdasarkan keputusan Mahkamah Rayuan dan undang-undang seperti yang dinyatakan dalam s 281 KTN, defendan-defendan bertanggungjawab dari segi kecuaian kepada plaintif untuk kerugian yang ditanggung berkenaan dengan kemudahan overdraf berjumlah RM700,000 (lihat ms 344G–H).

(3) Memandangkan peminjam bukanlah pemilik harta subjek dan oleh kerana permintaan untuk mewujudkan kaveat pemegang lien berpunca daripada peminjam dan bukannya pemilik berdaftar

hartanah tersebut, jelaslah defendan-defendan cuai dalam menasihati bahawa kaveat pemegang lien adalah cagaran yang memadai untuk kedua-dua kemudahan overdraf pertama dan kedua (lihat ms 345D).

(4) Pengakuan defendan kedua bahawa defendan-defendan memang menasihati plaintif bahawa plaintif mempunyai cagaran untuk kemudahan sebanyak RM1.2 juta kepada peminjam melalui kaveat pemegang lien merupakan pengakuan kecuaian yang jelas berdasarkan fakta bahawa kaveat pemegang lien telah dibuktikan tidak membentuk cagaran sama sekali. Dengan bergantung kepada nasihat defendan-defendan, plaintif telah menanggung kerugian seterusnya dengan memberikan kemudahan overdraf sebanyak RM500,000 tanpa apa-apa cagaran yang wajar (lihat ms 346C–E).

(5) Nasihat untuk menarik balik kaveat pemegang lien yang pertama sungguh tidak wajar. Namun demikian, memandangkan fakta bahawa kaveat pemegang lien yang pertama adalah tidak sah, nasihat yang cuai ini atas penarikan balik dan pemfailan semula kaveat pemegang lien mungkin tidak membawa padah (lihat ms 347B).

(6) Plaintif telah membuktikan, melalui dua kemudahan yang disediakan dan penggunaan kemudahan itu, bahawa ia telah bergantung kepada nasihat defendan-defendan. Plaintif juga telah menunjukkan apakah nasihat yang harus diberikan dan bahawa andainya nasihat yang betul telah diberikan, ia tidak akan melepaskan wang tersebut. Maka, plaintif mestilah berjaya terhadap defendan-defendan dari segi kecuaian (lihat ms 347G–I dan 348A); *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698 diikut.

(7) Kerugian plaintif haruslah berdasarkan kerugian cagaran. Sekiranya defendan-defendan telah memasukkan kaveat pemegang lien yang sah maka, jika ingkar, plaintif akan mendapat balik wang berikutan jualan hartanah tersebut. Sebarang perbezaan selepas menolak hasil jualan dan kos guaman adalah kerugian mereka. Oleh kerana tiada apa-apa cabaran telah diambil, ia diputuskan bahawa defendan-defendan telah bersetuju bahawa harga pasaran boleh menjadi harga yang betul hartanah tersebut (lihat ms 349I dan 350C–D).]

Notes

For cases on expert witness, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4961–4968.

For cases on creation of lien, see 8 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1997–2007.

For cases on negligence of solicitors, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1442–1443.

Cases referred to

Bristol & West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698 (folld)

Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp (a firm) [1979] Ch 384 (folld)

Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd & Anor (No 1) (refd)

Legislation referred to

Evidence Act 1950 ss 45, 114(g)

National Land Code 1965 ss 281(1), (2), 322(2)

Lee Wooi Meng (*Winston Tan* with him) (*Shook Lin & Bok*) for the plaintiff.

Manjit Singh (*Balvinder Singh* with him) (*Sri Ram & Co*) for the defendants.

Kamalanathan Ratnam J:

FACTS

The plaintiff had, by way of a letter of offer dated 17 August 1984, granted an overdraft of RM700,000 ('the first overdraft facility') to one MAA Holdings Sdn Bhd ('the borrower'). The said facility was to be secured, inter alia, by a registered third party first legal charge for the said sum. The said charge was to be created over a property ('the said property') whose registered owner was one Loo & Sons Realty Sdn Bhd ('the owner/chargor'). In the meantime, the owner/chargor had entered into a sale and purchase agreement on 16 December 1983, to sell the said property to one Land Holdings Sdn Bhd.

There was, however, one catch. The said property was subject to a restriction-in-interest term, which prohibits any transfer, creation of a lease or any security without the state authority's approval. One of the terms of the said letter of offer was that 'utilization of the overdraft may be allowed only after the execution of all security documents and presentation of the charge for registration'.

By a letter dated 23 August 1984, the plaintiff instructed the legal firm of Megat Najmuddin Leong & Co, of which the named defendants herein were all partners, to attend to the creation of a third party charge by the owner, over the said property, as security for the said first overdraft facility in favour of the plaintiff, and also to obtain the execution of letters of guarantee by the directors of the borrower. The plaintiff also enclosed a copy of its letter of offer dated 17 August 1984, and the original title of the said property.

The borrower however was in need of urgent cash. Since it would take a minimum of two months to obtain the consent from the state authority, the borrower proposed to the plaintiff the creation of a lien-holder's caveat over the said property. There then followed four different letters issued by the defendants to the plaintiff.

CASE FOR THE PLAINTIFF

The plaintiff contends that the first letter, dated 4 September 1984, contained the defendants' advice that a lien-holder's caveat would be sufficient security for the disbursement of the first overdraft facility at that point in time. Based on this advice, the plaintiff contends that it allowed for the drawdown of up to RM700,000. The plaintiff contends that this was a negligent advice.

The plaintiff then relies on the second letter dated 20 September 1984, which contained the defendants' advice to the plaintiff that the defendants had duly perfected the security of a lien-holder's caveat over the said property for the first overdraft facility of RM700,000, and as such, the borrower could be allowed utilization of the said facility. Again the plaintiff contends that this was a negligent advice.

Since the borrower was in need of a further overdraft facility of RM500,000, the plaintiff instructed the defendants to create a fresh lien-holder's caveat for the total sum of RM1.2m. By way of their third letter dated 17 December 1984, the defendants advised that since the earlier lien-holder's caveat did not stipulate a named sum, that lien-holder's caveat was sufficient to secure the second overdraft facility of RM500,000 to make a total security coverage for RM1.2m. The plaintiff contends that, yet again, this was a negligent advice.

By their fourth letter dated 24 March 1988, the defendants advised the plaintiff to withdraw the lien-holder's caveat lodged over the said property and to re-lodge the same to enable the transfer of the said property from the owner/chargor to the new purchaser, Land Holdings Sdn Bhd. The plaintiff contends that, yet again, this was negligent advice.

The plaintiff thus launched its claim against the three defendants, both on breach of contract and on negligence.

CASE FOR THE DEFENCE

The defendants contended that at all material times the plaintiff had knowledge that the said transfer from the owner to Land Holdings Sdn Bhd could not be registered because the consent of the state authority agreeing to the transfer had not been obtained. The defendants also contended that it was on the plaintiff's instructions that they caused a lien-holder's caveat to be registered in respect of the said property for the benefit of the plaintiff, pending the approval by the state authority for the said transfer. The defendants pleaded that at all material times, they had advised the plaintiff of all the consequences, legal obligations and rights pertaining to the aforesaid transaction in particular, the legal effect and the relationship between the plaintiff, the borrower, the owner and Land Holdings Sdn Bhd, arising out of the lien-holder's caveat and the disbursement of the funds. The defendants also argued that even before they could render advice, the plaintiff had allowed for a release of a sum of RM200,000 to the borrower without any security whatsoever, and in the circumstances, it could not be said that the plaintiff had relied on the defendants' advice before disbursing the funds.

A FINDINGS OF THE COURT

The overdraft facility of RM200,000

During cross-examination, PW2, the bank manager of the plaintiff, testified that a sum of RM200,000 was given to the borrower as a separate B temporary overdraft facility. When asked to produce the documentation relating to this sum, PW2 intimated that he could produce the said documents, which he never did. Clearly, the plaintiff had disbursed this sum on 16 August 1984 (see bank statement at 1CABD 121), which was even one day before the plaintiff's letter of offer which was dated 17 August 1984, granting the overdraft facility of RM700,000. I take into account the C evidence of PW1, another manager of the plaintiff's bank, who testified that the temporary overdraft facility of RM200,000 was to be treated as a separate facility on a clean basis and only to be a part of the RM700,000 facility if the charge was perfected.

In the circumstances, since the facility for RM200,000 was granted D even before the matter was referred to the defendants, I hold that the defendants cannot in any way be liable for this sum even if I were to find that the defendants had been negligent in their advice to the plaintiff.

The overdraft facility of RM700,000

E It is significant to note that the specific instruction given by the plaintiff to the defendants was to 'arrange for Messrs Loo & Sons Realty Sdn Bhd to execute', in the plaintiff's favour, a third party first legal charge for RM700,000 over the said property. The plaintiff also enclosed the original title. It is a fact that all parties were aware of the restriction-in-interest clause on the title. Even if the plaintiff was not aware of it, the borrower had clearly F drawn the plaintiff's attention to it by pointing out that since the state authority's consent for the transfer from the owner to Land Holdings Sdn Bhd would take a minimum of two months, and since the borrower was in need of funds, the borrower sought the plaintiff's consent for the creation of the lien-holder's caveat. I do not know if the plaintiff had written to the defendants upon receipt of the borrower's letter. But what has been G enclosed in the common agreed bundle of documents ('CABD') is the first letter from the defendants to the plaintiff dated 4 September 1984. This letter, apart from the impropriety or otherwise of the advice contained therein, also had a material factual error. It says 'the property to be charged has been purchased by the borrowers'. This is not at all true. The letter H continued:

> We are pleased to confirm that a lien holder's caveat in the circumstances would be in order and would be sufficient security at this point in time for the disbursements of funds. However we are unable to give any representations as to the aforesaid consents.

I The law on lien-holder's caveat

Subsections (1) and (2) of s 281 of the National Land Code 1965 ('the NLC') read as follows:

(1) Any proprietor or lessee for the time being, may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body — A

(a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat; and

(b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease. B

(2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith an order for sale of the land or lease.

Based on these two subsections, the right to grant a lien-holder's caveat over a property belongs only to the registered proprietor or lessee of the said property. It is not possible for a third party such as the plaintiff in this case, with whom the original document of title has been deposited for some other purpose, to be able to create a lien-holder's caveat in favour of the third party or the plaintiff in this case. C

In fact, the present plaintiff proceeded to foreclose the said property. The said foreclosure proceedings were the subject of another hearing. The trial judge held that the restriction-in-interest clause was an impediment to the sale and purchase agreement and that since the consent had not been obtained, there was no question of the contract being fulfilled. On appeal (see *Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd & Anor (No 1)* [1996] 3 MLJ 409), the Court of Appeal held that there was no evidence to show that the first respondent (the owner/chargor in the case before me) had authorized the second respondent (Land Holdings Sdn Bhd, the purchaser) to deposit the title deed. The Court of Appeal also found as a fact that there was no evidence that proved on a balance of probabilities that the first respondent was aware that the second respondent would deposit and did deposit the title deed with the appellant (the plaintiff in the case before me). The Court of Appeal had also found that a valid lien-holder's caveat did not exist. Finally, the Court of Appeal reiterated the principle that only the registered proprietor had the power or the right to deposit the title deed for the purpose of creating a lien-holder's caveat. D E F

Looking back to the instructions given by the plaintiff to the defendants, the plaintiff had expressly, in its letter dated 23 August 1984, directed the defendants to arrange to obtain a third party first legal charge from the owner. The defendants could have saved themselves the anguish of this trial if they had merely written to Loo and Sons Realty Sdn Bhd for its confirmation that the said owner had indeed deposited the original title and that it had no objections to a lien-holder's caveat being created. G H

At this juncture, I shall deal with the evidence of the plaintiff's expert witness.

Plaintiff's expert witness I

The plaintiff called, as its witness ('PW4'), one Santha Bhaskara Menon, an advocate and solicitor practising with Shearn Delamore & Co. She has been

A in active practice for the last 32 years, the last 18 of which has been confined to banking and conveyancing. She confirmed that she had been subpoenaed by the plaintiff to testify as a conveyancer who is fully conversant with current banking and conveyancing practice. She testified that if she had received a similar letter from the borrower to create a lien-holder's caveat, she would have written to the registered proprietor as to whether the title B deed had been deposited with the bank with their consent and that they had consented to the lodging of a lien-holder's caveat over the same to secure the facility to the borrower. She would also obtain the relevant board resolution from the owner before advising the bank.

Whilst not expressly referring to PW4 as an expert, the plaintiff led C evidence through this witness as to what a proper and competent conveyancer would have done in a similar situation. Whilst I am satisfied from her evidence that PW4 is a fully competent and committed banking and conveyancing practitioner, I cannot, in all fairness to the defence, attribute to her the label of an expert. Mr Manjit Singh's submission that PW4 cannot fall into the category of experts as defined by s 45 of the D Evidence Act 1950, has force.

It was obvious that PW4 was called upon to testify to show that the defendants were negligent in the performance of their duties to the plaintiff. To my mind, this case does not need an expert to assist the court. Clearly, the obligations that rest on the defendants are no more than as stated in the E provisions of the NLC and as found in the decided cases. One may be tempted to hold that an expert's evidence in relation to a particular situation is more as a result of hindsight. In a situation such as this, I hold that the true test is the foresight of a reasonable man and not the hindsight of an expert. Whether the defendants in this case have fallen foul of s 281 of the F NLC, is the issue. On this, it is relevant to refer to the decision of Oliver J in *Midland Bank v Hett, Stubbs & Kemp (A firm)* [1979] Ch D 384. In that case, the defendants were solicitors who had failed to register an option. A father had granted an option to purchase his farm to his son. Subsequently, with the object of defeating the option and having discovered that the option had not been registered, the father sold and conveyed the farm to his wife. G Subsequent to this transfer, a partner of the legal firm, realizing the omission to register, registered the option under the Land Charges Act 1925. The son then gave notice in purported exercise of the option. Neither the father nor the mother complied with the notice. The mother having died, the son commenced proceedings against the father and against his mother's executors of whom he himself was one, seeking a declaration that H the option was binding on her estate and claiming specific performance. Subsequently, both the father and the son died. In the meantime, the son had commenced an action against the defendant firm of solicitors claiming damages for negligence or breach of professional duty in neglecting to register the option and in failing to advise the son as to the necessity of doing so. The action was continued by the son's executors on his death.

I

In the course of showing to the court what practitioners would normally do, both the plaintiff and the defendants called various practitioners to

testify on each other's behalf. In respect of the evidence led by such practitioners, Oliver J said at p 402:

> As to this, I have heard the evidence of a number of practising solicitors. Mr Harman modestly contented himself with calling one; but Mr Gatehouse — mindful, no doubt of what is said to be the divine preference for big battalions — called no less than three. I must say that I doubt the value, or even the admissibility of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the court; whilst evidence of the witnesses' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide.

I accept and adopt this reasoning to the case before me. Further, in the mistaken belief that they had secured a proper lien-holder's caveat, the defendants wrote their second letter, dated 20 September 1984, relied on by the plaintiff to establish negligence. The defendants said as follows:

> We have been informed by the company secretary of the borrowers that application for consent to transfer and charge are still pending approval by the relevant authority.
>
> Upon receipt of this letter, you may allow the abovenamed borrowers to utilize the above facility.

The defendants had advised and thus authorized the release of this RM700,000, although they well knew that the state authority's consent had not been obtained as yet.

In the circumstances, on the basis of the decision of the Court of Appeal in *Perwira Habib Bank* and the law as laid out in s 281 of the NLC, I am constrained to find the defendants liable in negligence to the plaintiff for the loss suffered in respect of the overdraft facility amounting to RM700,000, with the fixed rate of interest.

The second overdraft facility of RM500,000

The borrower was again in need of further funds and this time requested from the plaintiff a further overdraft facility for RM500,000. Ensconced in the belief that it had a proper security in the form of the earlier established lien-holder's caveat, the plaintiff now wrote to the defendants on 12 December 1984, to arrange for the borrower to execute in their favour a lien-holder's caveat for RM1.2m (being the sum total of the two overdraft facilities) over the same property. The defendants were also instructed to obtain the usual joint and several guarantee from the company's directors.

A This is where the plaintiff now relies on the third letter from the defendants, dated 17 December 1984, to attribute negligence against them. The defendants' advice was that since no figure was mentioned in the lien-holder's caveat in respect of the earlier overdraft facility of RM700,000, this 'operates to prohibit any further dealings on the property. Therefore there is no necessity to lodge another lien-holder's caveat'.

B Since the defendants had based their full faith and trust upon the lien-holder's caveat earlier created, it is necessary to refer again to the first letter dated 20 September 1984. Notwithstanding the fact that consent was not obtained, the defendants advised the plaintiff to allow the borrower to utilize the facility. This to my mind, clearly meant that whilst the defendants C knew that the consent from the state authority was necessary for the transfer and thus to create the third party first legal charge in favour of the plaintiff, they were equally confident that the lien-holder's caveat could be relied on as security for the said first overdraft facility and now for this second overdraft facility of RM500,000. Since the borrower was not the owner of the subject property and since the request to create the lien-holder's caveat D came from the borrower and not the registered owner of the property, clearly the defendants were negligent in advising that the lien-holder's caveat was sufficient security for both the first and the second overdraft facilities.

The defendants ought to have warned themselves that with the E restriction-in-interest on the title, and in the event the consent of the state authority could not be obtained, the then lien-holder's caveat would ultimately be the only security to be relied upon. Hence, all the more it was pertinent and relevant for the defendants to ensure that their advice that the lien-holder's caveat was sufficient security was indeed sound.

F The second defendant, who was mainly handling this matter, admitted under cross-examination that he had no written record of having contacted the owners of the property. He also confirmed that he did not check with the owners whether if they agreed to the creation of the lien-holder's caveat over the said property. In fact, the second defendant admitted that his advice, as contained in the first letter dated 4 September 1984, 'was based G on presumptions'.

I find that the advice as contained in the said letter gave the plaintiff the impression that there was nothing further to be done to accept a lien-holder's caveat as an interim security pending the creation of a third party first legal charge, and that the plaintiff could readily obtain a valid and H enforceable lien-holder's caveat to serve as an interim security to secure the said first and second overdraft facilities. In fact, the second defendant also admitted under cross-examination that the plaintiff had, on the basis of his advice as contained in the first letter dated 4 September 1984, agreed to an immediate release of the said first overdraft facility on the security of the lien-holder's caveat. Further, whilst the second defendant confirmed he had I obtained a board resolution from the owners, consenting to the creation of the lien-holder's caveat, yet none was produced. What is most damaging against the defendants is the second defendant's admission that he knew the

requirements for creating a lien-holder's caveat and that the title was to be deposited by the registered proprietor with the express intention of creating a lien-holder's caveat as security for a loan. Further, another resolution from the board of directors of the owners consenting to the additional lien being created for the subsequent overdraft facility for RM500,000, ought to have been obtained and produced in court. This was not done. To my mind, the defendants had obviously equated a lien-holder's caveat to that of a private caveat. In their third letter dated 17 December 1984, the defendants opined that the non-mention of the sum of RM700,000 in the lien-holder's caveat operated 'to prohibit any further dealings in the property'. This prohibition relates to a private caveat (see s 322(2) of the NLC for the effect of a private caveat). In any case, the second defendant's admission that by the third letter dated 17 December 1984, the defendants were indeed advising the plaintiff that the plaintiff was properly secured for the facility of RM1.2m to the borrower by way of a lien-holder's caveat, is an unequivocal admission of negligence based on the fact that the lien-holder's caveat has been proven to be no security at all. In fact, on this third letter, the plaintiff agreed to grant the additional overdraft of RM500,000 to the borrower, on the basis of the lien-holder's caveat, over the said property to cover the total sum of RM1.2m, and thus allowed for the drawdown of an additional RM500,000 against the lien-holder's caveat lodged earlier.

It is my judgment that the plaintiff, in reliance upon this third letter, suffered a further loss by giving an overdraft facility for RM500,000 without any proper security based on the defendants' negligent advice.

The final and fourth letter, dated 24 March 1988, relied on by the plaintiff to show the defendants' negligence, contained the defendants' advice to the plaintiff to the effect that the duly stamped transfer was in their possession for the transfer of the said property from the owner to Land Holdings Sdn Bhd and that the defendants were in the process of registering the same with the Land Office. The defendants also advised the plaintiff to withdraw the first lien-holder's caveat and lodge a fresh lien-holder's caveat. The explanation given in court for this conduct was that since there was already a lien-holder's caveat on the title, this would prevent the registration of the transfer from the owner to Land Holdings Sdn Bhd. However, it is clear from the evidence that the defendants had not obtained the appropriate board resolution from the registered proprietor of the said property, with regard to their consent to enter the lien-holder's caveat to secure the facility of RM1.2m to the borrower. In fact, the second defendant had admitted in evidence that the defendants had not advised the plaintiff that they had neither obtained the owner's nor Land Holdings Sdn Bhd's board resolution for the creation of the second lien-holder's caveat to charge the said property to the plaintiff. Another point of interest to note is that by this time, the borrower had already defaulted in the repayment of the first and second overdraft facilities and hence the possibility of either the owner or Land Holdings Sdn Bhd giving their consent would seem a far fetched possibility. Further, based on the defendants' pleadings that the sale and purchase agreement had already been terminated by reason of Land

Holdings Sdn Bhd having failed to obtain the requisite consent to transfer from the state authority within the time stipulated in the said agreement. It would therefore again be highly unlikely for the registered owner to commit his land to a lien-holder's caveat over the said property. Hence, the advice to withdraw the first lien-holder's caveat was not proper. However, considering the fact that the first lien-holder's caveat was itself invalid, this negligent advice of withdrawing it and refiling a fresh lien-holder's caveat might seem of no consequence.

Mr Manjit Singh for the defendants argued that since the plaintiff never asked for specific advice, the plaintiff now cannot contend that the advice by the defendants on the lien-holder's caveat is improper. This submission is unmeritorious. The instructing letter which I had referred to earlier is very clear. The plaintiff wanted a third party first legal charge on the property. On the borrower's request for a lien-holder's caveat, the defendants volunteered the advice that this was 'sufficient security'.

In *Bristol & West Building Society v Mothew (t/a Stapley & Co)* [1996] 4 All ER 698, Millett LJ made a very pertinent comment as to what the plaintiff ought to show when suing his solicitor for professional negligence. His Lordship said at pp 705–706:

> Where a client sues his solicitor for having negligently failed to give him proper advice, he must show what advice should have been given and (on a balance of probabilities) that if such advice had been given, he would not have entered into the relevant transaction or would not have entered into it on the terms he did. The same applies where the client's complaint is that the solicitor failed in his duty to give him material information. ...
>
> Where, however, a client sues his solicitor for having negligently given him incorrect advice or for having negligently given him incorrect information, the position appears to be different. In such a case, it is sufficient for the plaintiff to prove that he relied on the advice or information, that is to say that he would not have acted as he did if he had not been given such advice or information. It is not necessary for him to prove that he would not have acted as he did if he had been given the proper advice or the correct information.

This is precisely what happened in this case. I am satisfied that this was a case where the defendants had given incorrect advice to the plaintiff. The plaintiff has proved, by the two facilities provided, and the drawdown made thereon, that it had relied on the advice of the defendants. I am also satisfied that no bank would have proceeded to offer the facilities if it had been advised that it ought not to provide the facilities without the consent of the state authority first being obtained. Whilst I agree that such advice would be relevant towards the creation of a third party first legal charge, I also find that the defendants have been guilty of failing to give the plaintiff proper advice in respect of the lien-holder's caveat. Here, the defendants were clearly negligent in advising the plaintiff that the lien-holder's caveat was 'sufficient security' when it was clearly invalid, since the registered proprietor had not given its consent for the creation of the said lien-holder's caveat. The plaintiff has also shown what advice ought to have been given and that if the proper advice had been given, it would not have released the

funds. I am therefore satisfied that upon both limbs as proposed by Millet LJ in *Bristol & West Building Society v Mothew*, the plaintiff must succeed as against the defendants in negligence.

There is one other issue raised by Mr Manjit Singh that I ought to consider. It was his submission that the issue of the lack of consent to transfer the said property from the state authority was a pertinent issue, in that both the High Court and the Court of Appeal had held that no such consent existed. Learned counsel for the defendants then referred me to a letter, dated 25 January 1988, from the Pentadbir Tanah Daerah, Wilayah Persekutuan, stating that the consent had been given on 25 January 1988, and that the said consent was valid and effective for the next six months. He argued that this was a material non-disclosure to the High Court at the foreclosure proceedings and that on this issue alone, since the consent had been obtained, I ought not to find for the plaintiff.

Learned counsel, however, had significantly failed to address the court on how this argument can overcome cl 2 of the sale and purchase agreement dated 16 December 1983, which stipulates that the balance of the purchase price would be paid not later than four months from the date of the said agreement provided that the consent required for the transfer of the said property from the owner to Land Holdings Sdn Bhd and the consent for the creation of a charge over the said property in favour of any financial institution or bank from which the purchaser intended to raise a loan to pay for such part of the purchase price, *have been first obtained.* Subclause 2(a) provides for an extension of two months only after which the said agreement shall determine, with neither party having any claim against the other.

It is pertinent to note that the consent was dated 25 January 1988, that is, about four years later, by which time the agreement had been determined. In fact, a copy of the document of title has been included in the CABD and it shows that the transfer which was effected on 22 July 1988 has been cancelled subsequently.

The documentary evidence agreed and admitted to by both parties during the case management stage and compiled and filed as CABD clearly speaks against the submission of a valid consent being obtained. Even though no oral evidence was led from the Land Office to explain the lack of action by the plaintiff after the registered owner received the letter dated 25 January 1988, the admitted documents constitute sufficient credible evidence which this court can accept. I therefore reject the defendants' call that I invoke s 114(g) of the Evidence Act 1950.

On the evidence, I find the defendants liable both in contract and in the tort of negligence to the plaintiff.

Contributory negligence

In their submission, the defendants argued in the alternative that if liability is found against them, then I ought to consider contributory negligence on the part of the plaintiff based on the evidence submitted by the defendants. It is trite law that if a defendant wishes the court to consider contributory negligence, then it must be pleaded in the defence, failing which the court

A will not consider such a plea (see *Nathan on Negligence* (1998 Ed) pp 101–104). In the circumstances, the plea of contributory negligence is unavailable to the defendants since this plea has not been pleaded.

Damages

B After reading the submissions of both parties, I sought further clarification and requested that counsel address me further on the issue of damages.

Counsel for the plaintiff, Ms Lee Wooi Mien, then summarized the plaintiff's claim into two alternatives. She argued that:

C (1) The plaintiff was entitled to the full loss sustained, that is, the amount outstanding on the borrower's account referred to in the CABD amounting to RM9,339,313.12 with interest accruing from 1 October 1997 to date of judgment at 16.5% pa.

(2) Alternatively, she argued for the loss of value of the security, namely, the said property, which according to the last reported valuation done D on 5 November 1996, was set at a market value of RM3.3m with interest only after judgment. The said valuation report was included by agreement of parties into the CABD.

Mr Balvinder Singh for the defendants submitted that I should totally ignore the first alternative, as it was totally inequitable. With regard to the E second alternative, he conceded that in the event liability was found against the defendants, then the court could accept the second submission of the plaintiff.

The first alternative

F Whilst the sum of RM9,339,313.12 was shown in the bank's statement of accounts included in the CABD, this sum clearly includes the drawdown facility of RM200,000 earlier granted by the plaintiff on its own volition and without the defendants' advice. In her subsequent clarification before me, Ms Lee for the plaintiff pointed out that a sum of RM197,883.74 was G overdrawn and that together with the accumulated interest the sum accrued on the RM200,000 overdraft facility stood at RM1,755,596.40. When I asked her how she arrived at this figure, she readily conceded that there was no evidence on this, and that this was as a result of her own calculation. I cannot accept this. On this score alone, I reject the first alternative approach to the assessment of damages. I also do not have to consider the issue H whether the defendants are liable for all the natural consequences that flow as a result of their tortious act.

The second alternative

I accept the alternative suggestion that the plaintiff's loss should be based I on the loss of the security. Had the defendants lodged a valid lien-holder's caveat, then upon default, the plaintiff would have been able to recover upon sale of the said property. Any difference after setting off the proceeds of sale and the legal costs would have been their loss.

Market value or forced sale value

The plaintiff had put in by consent and without challenge, a valuation report on the said property as at 5 November 1996, stating the market value of the said property at RM3.3m.

To my mind this was sufficient evidence of the value of the property. Needless to say, if there is to be a forced sale, there could be the possibility that the value of the property might be less than the market value. But then, this is for the defence to challenge. The defendants could have required the attendance of the valuer in court and could have cross-examined him on the value upon a forced sale. Or alternatively, the defendants could have called their own valuer to have adduced evidence on the forced sale value of the property. Since no challenge of any sort was taken, I am compelled to hold that the defendants had conceded that the market value could be the correct value of the said property. The defendants' mere submission, without any basis, that the forced sale value of the property be accepted at 10% of the market value, is unacceptable; the 10% was a figure, merely 'plucked from the air'.

I therefore give judgment for the plaintiff against the defendants in the sum of RM3.3m with interest at 8% only from date of judgment. The plaintiff will have its costs.

Plaintiff's claim allowed.

Reported by Jafisah Jaafar